

2:23-cv-00140-MMD-DJA - October 13, 2023

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEVADA

3 RICHARD GIBSON, and)
4 HERIBERTO VALIENTE,)

5 Plaintiffs,)

6 vs.)

7 MGM RESORTS INTERNATIONAL,)
8 CENDYN GROUP, LLC, THE)
9 RAINMAKER GROUP UNLIMITED,)
10 INC., CAESARS ENTERTAINMENT)
11 INC., TREASURE ISLAND, LLC,)
12 WYNN RESORTS HOLDINGS, LLC)

13 Defendants.)

Case No. 2:23-cv-00140-MMD-DJA

Las Vegas, Nevada

October 13, 2023

11:08 a.m. - 12:22 p.m.

Courtroom 4B

MOTION HEARING

CERTIFIED COPY

12 REPORTER'S TRANSCRIPT OF PROCEEDINGS
13 BEFORE THE HONORABLE MIRANDA M. DU
14 UNITED STATES DISTRICT COURT JUDGE

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(Appearances continued on page 2.)

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UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914

2:23-cv-00140-MMD-DJA - October 13, 2023

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2:23-cv-00140-MMD-DJA - October 13, 2023

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UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914

2:23-cv-00140-MMD-DJA - October 13, 2023

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2:23-cv-00140-MMD-DJA - October 13, 2023

1 LAS VEGAS, NEVADA; FRIDAY, OCTOBER 13, 2023; 11:08 A.M.

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3 P R O C E E D I N G S

4 **COURTROOM ADMINISTRATOR:** Richard Gibson versus MGM
5 Resorts International, 2:23-cv-140-MMD-DJA. This is the time
6 set for a hearing on the motions to dismiss.

7 Counsel, please make your appearances, starting with
8 the plaintiff.

9 **MR. PIERCE:** Good morning, Your Honor. Rio Pierce
10 from Hagens Berman for the plaintiffs.

11 **MR. HOSMER-HENNER:** Adam Hosmer-Henner, McDonald
12 Carano, for Caesars Entertainment.

13 **MR. AULD:** Sam Auld from Skadden Arps for Caesars.

14 **MR. BERSHTEYN:** And Boris Bershteyn from Skadden Arps
15 for Caesars.

16 **MR. HUSENY:** Good morning, Your Honor. Sadik Huseny
17 of Latham & Watkins for defendant Cendyn Group, LLC.

18 **MS. KRISTOVICH:** Good morning, Your Honor. Bethany
19 Kristovich of Munger, Tolles & Olson on behalf of MGM Resorts
20 International.

21 **MR. MACH:** Good morning, Your Honor. Kyle Mach from
22 Munger, Tolles & Olson for MGM Resorts International.

23 **MR. BICE:** Good morning, Your Honor. Todd Bice on
24 behalf of MGM Resorts.

25 **MR. MIRKOVICH:** Good morning, Your Honor. Samuel

UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914

2:23-cv-00140-MMD-DJA - October 13, 2023

1 Mirkovich on behalf of the Cendyn Group.

2 **MR. McSHANE:** Good morning, Your Honor. Brendan
3 McShane of Latham & Watkins on behalf of the defendant Cendyn
4 Group.

5 **MR. REILLY:** Good morning, Your Honor. Pat Reilly of
6 Brownstein on behalf of Treasure Island.

7 **MS. TSOUMAS:** Good morning, Your Honor. Tammy
8 Tsoumas from Kirkland & Ellis on behalf of Wynn Resorts
9 Holdings.

10 **MR. AUSTIN:** Good morning, Your Honor. Brad Austin
11 from Snell & Wilmer also on behalf of Wynn Resorts.

12 **MR. SANTORO:** Good morning, Your Honor. Nick Santoro
13 on behalf of Rainmaker Group.

14 **THE COURT:** Well, there are a number of you
15 representing defendants. So this hearing is set on one
16 motion, that's the joint motion to dismiss, which is ECF
17 Number 91.

18 So, for the record, I have reviewed the brief
19 relating to the joint motion once. I reviewed the complaint a
20 number of times. I had hoped to issue a written order on
21 MGM's separate motion. And as I indicated in the minute
22 order, I don't need to hear argument on that motion.
23 Unfortunately, my aspirational goal I did not meet, but I
24 still plan to issue a written order addressing both motions,
25 not just the one that I said I would address, which is the MGM

2:23-cv-00140-MMD-DJA - October 13, 2023

1 motion.

2 So let me hear arguments then. And who will be
3 arguing for the defendants in terms of the joint motion?

4 **MR. BERSHTEYN:** Good morning, Your Honor. Boris
5 Bershteyn on behalf of Caesars, and I'll be arguing on behalf
6 of all defendants for the joint motion.

7 **THE COURT:** All right. Please proceed.

8 **MR. BERSHTEYN:** Your Honor, good morning. You can
9 hear me all right? Can you hear me all right?

10 **THE COURT:** No. So you need to -- yes. Just make
11 sure you pull the --

12 **MR. BERSHTEYN:** How about now?

13 **THE COURT:** Yes.

14 **MR. BERSHTEYN:** All right. Perfect.

15 Your Honor, we are mindful of the Court's minute
16 order which asks that the parties be prepared to address what
17 the Court would do if it were to grant our motion to dismiss.
18 Because --

19 **THE COURT:** And I can tell you where I am
20 tentatively. So certainly I -- I didn't review all the cases
21 cited. I reviewed what I consider to be three primary
22 Ninth Circuit cases: *The Musical Instruments*, *In re Dynamic*,
23 I think, and *Kendall*.

24 And so in those three cases the Circuit refers to
25 amended complaint which suggests to me that there were initial

2:23-cv-00140-MMD-DJA - October 13, 2023

1 complaint and leave to amend was given. In two of those cases
2 there were limited discovery allowed. But I tend to agree
3 with defendants in the motion that I think the complaint fails
4 to state a plausible claim for relief under the pleading
5 standard that I have to apply under binding Ninth Circuit case
6 law. But I do -- I cannot find that amendment would be
7 futile.

8 Unfortunately, in response to the motion, plaintiffs
9 did not lay out for me what they would be able to allege to
10 cure the deficiency because they don't admit that there are
11 any deficiencies. So that's kind of where I am.

12 But in reading *Kendall*, I don't agree with the
13 defendants that *Kendall* requires that the complaint has to
14 answer the questions of when, where, who, when, how -- who,
15 when, where, what. Because, in *Kendall*, the Court found that,
16 even after deposition, the amended complaint did not answer
17 those questions. But it doesn't mean that you have to answer
18 those questions for the complaint to survive, right, to
19 survive dismissal?

20 **MR. BERSHTEYN:** Respectfully, Your Honor, I don't
21 think I would read *Kendall* the same way.

22 So what happened in *Kendall* is that the Court
23 permitted some limited discovery prior to adjudicating the
24 motion to dismiss.

25 **THE COURT:** Should I allow that here? A request was

2:23-cv-00140-MMD-DJA - October 13, 2023

1 not made, though.

2 **MR. BERSHTEYN:** Your Honor, actually a request had
3 been made. We were served with discovery. We -- we agreed to
4 provide a certain amount of discovery, but -- this was
5 after -- of course all after the complaint was filed. And
6 then there was a motion to stay the remainder of discovery
7 litigated before Magistrate Judge Albregts. The magistrate
8 judge agreed that would -- that what we agreed to provide is
9 sufficient at this stage in light of the papers and the motion
10 to dismiss. And we have completed that discovery, and --

11 **THE COURT:** When was that discovery completed?

12 **MR. BERSHTEYN:** Oh, goodness. It would have been a
13 month or two ago.

14 **THE COURT:** So after briefing was completed?

15 **MR. BERSHTEYN:** Yes, after the briefing on the motion
16 to dismiss because it took some time to brief the stay motion
17 and for the magistrate judge to adjudicate it, and that
18 decision was not appealed to Your Honor.

19 So we are in a situation where some discovery has
20 been allowed, as was the case in *Kendall* and *Musical*
21 *Instruments*, and it's been completed. But I think where I
22 might part ways, respectfully, with Your Honor is that, now
23 that some discovery has been completed, the plaintiffs here
24 are essentially in the same position as the plaintiffs in
25 *Kendall*. They have some information, and now they have to

2:23-cv-00140-MMD-DJA - October 13, 2023

1 answer the *Kendall* questions. If -- even if Your Honor finds
2 that they couldn't -- didn't have sufficient information to
3 answer them on the initial complaint, they would -- if
4 Your Honor allows amendment, certainly plaintiffs would need
5 to answer it on the amended complaint to match *Kendall*.
6 Though --

7 **THE COURT:** All right. So going back to what *Kendall*
8 requires -- I didn't realize -- I recall reading that there
9 was a stay of discovery, and -- but I didn't realize that some
10 limited discovery had been conducted.

11 The -- and so my recollection of stayed discovery
12 relates to prior order that I saw coming out. I haven't
13 reviewed all the filings on the docket. But in answering
14 *Kendall*'s questions in the opposition brief, I think that
15 defendants are asking for those questions to be answered with
16 too much specificity. That's more demanding than I think what
17 *Kendall* requires. Why don't you address that point?

18 **MR. BERSHTEYN:** Absolutely. So let's start with the
19 who. The -- in *Kendall*, the -- what the plaintiffs have said
20 is essentially the who is the defendant banks. And here what
21 the plaintiffs say in the -- I think it's page 22 of their
22 brief is that the who is the defendant hotels. So in a sense
23 we are positioned no differently than --

24 **THE COURT:** Well, defendant hotel operators who own a
25 combined 20 to -- 20 of the 30 hotels in the Las Vegas Strip.

2:23-cv-00140-MMD-DJA - October 13, 2023

1 **MR. BERSHTEYN:** That's -- that's the allegation, but
2 the question who is but who formed the alleged agreement. And
3 what -- what the Ninth Circuit said in *Kendall* is the
4 defendant banks have hundreds of employees -- they probably
5 have much more than that. The same is true of the defendant
6 hotels. What the plaintiffs have to plead in pleading an
7 agreement is who was the human being or the alleged human
8 being who participated in forming the agreement.

9 **THE COURT:** So are the defendants' position that they
10 have to allege specific individual representatives from each
11 of the hotel operators who were involved in a discussion that
12 resulted in this -- and we'll get to the alleged agreement in
13 a moment.

14 **MR. BERSHTEYN:** That is our position. And, in fact,
15 it's not particularly inconsistent with -- with the law cited
16 in plaintiffs' own brief.

17 So if we look at the plaintiffs' -- plaintiffs'
18 opposition brief and look at the -- at the various authorities
19 on which they rely that are sort of examples of -- of District
20 Court cases where the *Kendall* standard was met, there's only
21 one that comes from within Ninth Circuit where the *Kendall*
22 standard would really be directly applicable, and that's the
23 *Potato* case in the District of Idaho.

24 And what the -- what the plaintiffs in that case
25 alleged in order to meet the *Kendall* standard is that there

2:23-cv-00140-MMD-DJA - October 13, 2023

1 was a meeting at a particular town in Idaho in I believe
2 September 2004, and it was organized by I think Mr. Wada and
3 Mr. Cornelius who were from Wada Farms and Cornelius Farms.
4 There were 23 attendees, and what was discussed at that
5 meeting was a decision among the potato growers to suppress
6 the -- the volume of potatoes to be grown essentially.
7 There's nothing like that alleged in this case. And that's
8 probably their best -- best authority for a complaint that
9 would survive the *Kendall* questions.

10 And plaintiffs do even worse on the when because they
11 essentially concede in the complaint that the conspiracy began
12 at a time unknown. I think that's paragraph 87 of the
13 complaint. And courts, certainly after *Kendall*, in the
14 Ninth Circuit pretty routinely dismiss complaints alleging a
15 conspiracy when it's not alleged when the conspiracy began.

16 And then, finally, there is the what, which we think
17 is particularly important. And here it's actually not clear
18 from the pleading exactly what it is that they claim the hotel
19 defendants agreed to do, how that agreement was -- how the
20 compliance of that agreement was monitored or enforced.

21 **THE COURT:** So in terms of the what, I'm -- I agree
22 it could be clearer, but when I read the complaint again this
23 morning -- I'll point out the paragraphs where they alleged
24 the what here.

25 So paragraph 11 alleges that Rainmaker offers

2:23-cv-00140-MMD-DJA - October 13, 2023

1 different pricing algorithms, and they mention three in the
2 complaint. And between paragraph -- sorry. Give me a moment
3 here. Let me look at my notes.

4 Paragraph 21 also alleges that -- and there were
5 other -- a number of other paragraphs I'll find in a moment.
6 Basically these paragraphs combine alleges that Rainmaker's
7 offer these revenue management programs -- three of them --
8 and that the hotel operators -- in order to use the program,
9 the hotel operators agree to provide nonpublic, specific
10 information about clients, pricing, demand, and so on. In
11 exchange, Rainmaker then provide recommendations for pricing.
12 That's kind of the gist of the allegation --

13 **MR. BERSHTEYN:** And I think --

14 **THE COURT:** -- of the what.

15 **MR. BERSHTEYN:** And I -- I can address each of those,
16 but let me start with the fundamental point. Nothing that
17 this paragraph says or that Your Honor just recited describes
18 the agreement among the hotel defendants. This is a -- this
19 is a case that fundamentally allege -- is -- purports to try
20 to plead a horizontal agreement among hotel defendants. If
21 you look at paragraph 3, which is the very beginning of the
22 complaint, they say hotel defendants colluded. Well, that
23 requires an articulation in some clear form of what it is that
24 the hotel defendants agreed to do.

25 Nothing like that is found in that paragraph. What

2:23-cv-00140-MMD-DJA - October 13, 2023

1 that paragraph --

2 **THE COURT:** Well, could the Court reasonably infer
3 that what they're alleging is that the hotel defendants agreed
4 to accept the pricing recommendations that -- from Rainmaker?

5 **MR. BERSHTEYN:** I don't think Your Honor should infer
6 that because plaintiffs haven't alleged that, and I don't
7 think plaintiffs can allege that consistent with Rule 11.

8 There is no -- it would be -- it would be -- if one
9 of the conditions of using -- let's imagine a world in which a
10 condition of using Rainmaker was that, we give you
11 recommendations, you have to accept them. That would be very
12 easy to allege, but they don't allege that because they know
13 it's not true. They -- in fact, it's alleged not to be
14 true --

15 **THE COURT:** So they allege that Rainmaker provides
16 the pricing recommendations.

17 **MR. BERSHTEYN:** Yes.

18 **THE COURT:** But there's no connection after that to
19 what the hotel operators agree or doesn't -- do not agree to
20 do?

21 **MR. BERSHTEYN:** That -- that -- I'm sorry.

22 **THE COURT:** Go ahead.

23 **MR. BERSHTEYN:** They appear to concede that. So let
24 me -- if you look at -- at the first page of their opposition
25 brief -- so their opposition brief at page 1 reads -- I'm in

2:23-cv-00140-MMD-DJA - October 13, 2023

1 the second paragraph in the second sentence: Operators give
2 Rainmaker real-time access to competitive data regarding
3 occupancy rates and guests. Its -- that's Rainmaker --
4 algorithms then output recommendations that operators can
5 accept.

6 Okay. That -- that doesn't -- so there's no
7 obligation. What Rainmaker does to -- I'm sorry.

8 **THE COURT:** This is my thought that I was thinking
9 earlier. So can accept. And can the Court reasonably infer
10 that it's possible that they can possibly state that the hotel
11 operators do accept, which is resulting in price increases,
12 elevated hotel price increases across the Strip?

13 **MR. BERSHTEYN:** No, Your Honor. And this is actually
14 a really important point and, to be candid, a somewhat
15 frustrating point about this complaint. This -- what --
16 whether the -- whether the hotels accept the
17 recommendations -- or agree to accept or even do accept
18 recommendations of Rainmaker is a fact. If plaintiffs plead a
19 fact, we have to assume it's true for the purpose of this
20 motion. But what they cannot do but they repeatedly do in
21 this complaint is beat around the bush to try to insinuate a
22 fact without actually pleading it because they know that fact
23 to be untrue. And the one that -- that Your Honor has focused
24 on is one of those.

25 **THE COURT:** Because one of the allegations is that

2:23-cv-00140-MMD-DJA - October 13, 2023

1 the recommendations are accepted 90 percent of the time or
2 90 percent acceptance rate or something to that effect.

3 **MR. BERSHTEYN:** Yes. That allegation is not only
4 unhelpful to plaintiffs, it's actually devastating to
5 plaintiffs' case and let me explain why. That it's accepted
6 90 percent of the time is itself an allegation that it doesn't
7 have to be accepted; right? I mean, that's their
8 allegation --

9 **THE COURT:** May not accept it 10 percent of the time;
10 right? Is that the math?

11 **MR. BERSHTEYN:** Yes. But it was -- but the only
12 thing we know is not true based on the complaint is that
13 there's any obligation to accept it because it's not accepted
14 100 percent of the time.

15 Now -- and the plaintiffs are -- are a little coy
16 about what it means to be accepted. They're accepted --
17 according to Rainmaker's advertisements, they're accepted
18 90 percent of the time by its clients. Rainmaker has
19 thousands of clients, and the hotel defendants here are a
20 vanishingly small percentage of those. So to -- you know,
21 so -- so that's why it's not helpful because it doesn't
22 actually tell you anything about what the hotel defendants do.

23 But let's just -- let's just make a leap which the
24 Court, you know, essentially has suggested it might be
25 contemplating making, that the hotel defendants also accept

2:23-cv-00140-MMD-DJA - October 13, 2023

1 90 percent of the time. Okay. So what would that show?
2 There are 31,000 -- there's 99.9 percent of Rainmaker's
3 clients who are not alleged to participate in this conspiracy.
4 For whatever reason, allegedly accept this recommendation
5 90 percent of the time. What would it prove that so do the
6 hotel defendants? It would just mean, if it were true, that
7 the hotel defendants do what nonconspirators do. It doesn't
8 prove any agreement among the hotel defendants. It would only
9 suggest that the hotel defendants are behaving the way
10 nonconspirators are behaving.

11 The way plaintiffs typically plead an antitrust case
12 is they say, well, you know, here's a period when there was no
13 conspiracy and the prices were low or here's what
14 nonconspirators do, they charge low prices. And here's what
15 conspirators do, they charge higher prices. If they want to
16 prove some suspicious behavior among hotel defendants and they
17 allege that everybody accepts Rainmaker's prices 90 percent of
18 the time on average, they would presumably have to allege as a
19 fact that hotel defendants here accepted substantially more
20 than 90 percent of the time, something like 100 percent. They
21 can't allege either of those things, the 90 or the 100,
22 because they know it's not true.

23 **THE COURT:** Well, they do allege that
24 traditionally -- so this is interesting because they're
25 relying on a pricing algorithm program to argue that the

2:23-cv-00140-MMD-DJA - October 13, 2023

1 program is really the Bob, if I use the example from the
2 complaint. But they do allege that the traditional model --
3 profit model for the hotel operators is to maximize occupancy
4 and keep occupancy at a low rate. Because you already billed
5 the hotel rooms, so of course you want to get them occupied to
6 maximize profit and occupancy. And that with Rainmaker's
7 pricing algorithms, hotel operators are able to maximize
8 profit by -- well, the inference is accepting the
9 recommendations to price at a noncompetitive level.

10 **MR. BERSHTEYN:** So I have three --

11 **THE COURT:** You have three problems with that?

12 **MR. BERSHTEYN:** -- thoughts about this proposition.

13 The first is the factual allegation here is that Rainmaker
14 goes around to different hospitality, you know, institutions,
15 which is their clients, and say we have -- we've got a product
16 that's going to increase your profits. That's the allegation.
17 That's what everyone does. That's what I fundamentally do to
18 my clients; right? No one goes around saying to their
19 clients, I have a product that's going to increase your sales
20 but it's not going to increase your profits, and so there's
21 nothing at all suspicious or anomalous about that.

22 Everyone --

23 **THE COURT:** No, there's nothing suspicious about
24 trying to maximize profit.

25 **MR. BERSHTEYN:** And then there's the question about

2:23-cv-00140-MMD-DJA - October 13, 2023

1 occupancy. So we know -- plaintiffs allege no facts about
2 changes in occupancy in Las Vegas among the hotel defendants
3 or anything else that would suggest that the actual -- in
4 real-life, the occupancy levels at the defendant hotels has
5 changed in any way let alone in relation to Rainmaker. That's
6 the second problem.

7 And the third problem is that this theory that in a
8 competitive world there would be zero -- it's essentially
9 100 percent occupancy at hotels. It's not a fact alleged.
10 It's a theory that plaintiffs propound. And that theory,
11 since we're talking about theory, is obviously wrong. If
12 it -- if in a competitive world -- so I work in Manhattan.
13 There's lots of hotels in Manhattan. It's a very competitive
14 market. Somehow I suspect on a given day the Ritz-Carlton
15 probably has an open room, and they don't, as just a matter of
16 common sense, put up that room for 100 bucks the night before.
17 It's just not how real world works.

18 So, you know -- so for the combination of the three
19 of those -- theory of those things, which is that there's
20 nothing at all suspicious about the only fact that's alleged,
21 which is what Rainmaker says, that there's no actual
22 information alleged about occupancy, no facts alleged, and
23 that the theory, which is the only thing that this particular
24 line of attacking plaintiffs is hanging on is -- is their
25 theory. And it's clearly not the real world, and I don't

2:23-cv-00140-MMD-DJA - October 13, 2023

1 think that the Court should make much of those allegations.

2 **THE COURT:** That goes to the defendants' point that
3 the assumption in the complaint is that the hotel rooms are
4 all comparable; right? That the hotel operations are all
5 comparable. Because in your Ritz-Carlton example, they don't
6 want to erode their reputation by offering rooms at whatever
7 rate --

8 **MR. BERSHTEYN:** Yes, exactly. Because the
9 Ritz-Carlton presumably knows that, you know, then, you know,
10 maybe cheapskates like me will wait until last minute --

11 **THE COURT:** Force sale.

12 **MR. BERSHTEYN:** -- to -- yeah. Exactly. So that's
13 pretty rational behavior.

14 On the fungibility of rooms -- or maybe Your Honor
15 has another question?

16 **THE COURT:** No, go ahead.

17 **MR. BERSHTEYN:** Plaintiffs do something that they
18 really can't do, which is have it both ways. What -- what --
19 on the one hand, plaintiffs claim, well, this is all one
20 market, these are all competitors, it's all fungible. On the
21 other hand, if you actually look at the way they describe
22 their market, which is at paragraph 73 of the complaint, they
23 say, well, they're fungible within the different classes of
24 rooms, which makes some sense because they're -- you know, as
25 Your Honor doubtless knows, the hotels represented here is --

2:23-cv-00140-MMD-DJA - October 13, 2023

1 certainly the properties of those hotels are not exactly
2 fungible, and then the hotel rooms within them are not
3 fungible. So the -- the market definition in which, you know,
4 this is all just one fungible market, has some serious
5 problems. I would say that it is probably the 18th or 19th
6 problem this complaint has, but we may be able to get there if
7 Your Honor perceives certain lines of plaintiffs' reasoning.

8 **THE COURT:** So while you're on paragraph 73, why
9 don't you look at paragraph 74 which is I think an attempt to
10 allege that there is a suggestion of an agreement in that
11 the -- the -- the hotel operators' employees gather annually
12 at this conference where everybody knows each other and they
13 share information and that's evidence that there's some kind
14 of agreement. I think that's the allegation.

15 **MR. BERSHTEYN:** I think that is the implication. It
16 is pretty much black letter law in these cases that this sort
17 of allegation doesn't move the needle at all, and probably the
18 best example of that is one of the cases with which the Court
19 began, which is *Musical Instruments*.

20 So just to remind the Court about the facts of
21 *Musical Instruments*, the makers of guitars and the retailers
22 of guitars were alleged to conspire to adopt a policy that
23 there would be sort of a minimum advertised price. There was
24 an association with meetings that all of them were alleged to
25 have attended to -- and it was alleged that they were

2:23-cv-00140-MMD-DJA - October 13, 2023

1 discussing this particular policy. And the Federal Trade
2 Commission went after the trade association about the
3 impropriety of those -- alleged impropriety of those
4 discussions. They filed a complaint, and the association
5 entered a consent decree. And yet the Ninth Circuit found
6 that those allegations of attendance at those meetings,
7 whatever exchange of information went on there, were
8 insufficient. So plaintiff --

9 *(Simultaneous crosstalk.)*

10 **THE COURT:** -- different between trade association,
11 which the Ninth Circuit in that case found there's value in,
12 than meetings that Rainmaker organized for their clients
13 exclusively. And if they have thousands of clients,
14 apparently these meetings, as alleged, they only invite a
15 limited group, 100 attendees for each meeting.

16 **MR. BERSHTEYN:** Well --

17 **THE COURT:** I remember reading somewhere there was
18 100 attendees at these annual meetings.

19 **MR. BERSHTEYN:** I have to say I don't recall that but
20 that is probably my fault.

21 I -- what is not alleged is that any -- is that
22 actual employees of our clients attended those meetings
23 together. How could Rainmaker holding meetings for its
24 clients, something that all businesses do, be -- be sufficient
25 to imply, you know, an agreement among those clients, let

2:23-cv-00140-MMD-DJA - October 13, 2023

1 alone an agreement that no one is alleging the clients
2 discussed at those meetings? Or take...

3 **THE COURT:** So what about the allegations that
4 confidential witness Number 3 alleges that the -- everyone
5 kind of knew each other at the con -- at the little conference
6 together, and that hotel operators would typically send
7 employees from revenue management teams to attend were they
8 share information about -- well, where they exchange insights
9 and ideas and discuss revenue management tools.

10 **MR. BERSHTEYN:** So sounds kind of like a bar
11 association meeting or something; right? Employees of
12 competitors attend it to discuss best practices and more
13 saliently even their own alleged confidential witness, any of
14 the three of them that are all allegedly employees of Cendyn,
15 they can't even place our clients at those meetings. How
16 could that be evidence of actual agreement among our clients
17 if all that's alleged is that some members of our industry
18 attended a meeting? You know, what's essentially like kind of
19 a let's just call it a trade association meeting. Those --
20 those kinds of allegations are almost routinely made in
21 antitrust cases and almost never move -- never, to my
22 knowledge, move the needle.

23 **THE COURT:** So I don't know if you want to transition
24 to the argument I assume that the Court should not grant leave
25 to amend because the deficiencies cannot be cured, unless you

2:23-cv-00140-MMD-DJA - October 13, 2023

1 want to give plaintiffs' counsel the opportunity to argue what
2 they're going to do to try to cure it, assuming that they want
3 to cure it, first before you respond.

4 **MR. BERSHTEYN:** I think that would be procedurally
5 proper. And I'll just say, you know, if -- for the record, if
6 anything, that it's been five months since plaintiffs made
7 their request to amend the complaint. It's been four months
8 since we indicated in our brief that that request has not
9 been -- you know, has not been supplied with sufficient detail
10 consistent with Local Rule 15-1. It's been a week since the
11 Court effectively reminded the parties of the same thing. We
12 are yet -- the Court or the defendants -- are yet to hear from
13 plaintiffs despite all this passage of time about what it is
14 they now believe they can allege. So both the Court and we
15 are now being placed in an unfortunate position, despite six
16 months of briefing, of having to respond to whatever it is
17 that plaintiffs will now say in real-time, which is not the
18 way the local rule is supposed to operate. Nonetheless, if
19 the Court were to entertain plaintiffs' representations, we
20 will certainly -- we will respectfully request an opportunity
21 to respond to --

22 **THE COURT:** I agree. And that argument resonates.
23 In fact, I think in the reply defendants cite to one of my
24 prior decisions where I deny leave to amend because there's no
25 specific I think indication as to how amendment would be --

UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914

2:23-cv-00140-MMD-DJA - October 13, 2023

1 how the deficiencies would be cured. I have to say, I think
2 that was from 2012 or 2013. Since then, I've been reversed
3 several times by the Ninth Circuit because I decline to give
4 leave to amend in addressing the complaint initially. Because
5 I think the -- showing that amendment would be futile, at
6 least with the initial complaint, may be rather a high bar to
7 set. But let me hear from plaintiffs' counsel.

8 **MR. BERSHTEYN:** Thank you, Your Honor.

9 **MR. PIERCE:** Good morning, Your Honor. Can you hear
10 me okay?

11 **THE COURT:** Yes.

12 **MR. PIERCE:** I'd like to start with the issue of
13 *Kendall*, and I do want to step back for a second and
14 distinguish between I would say what *Kendall* concerns and what
15 a lot of the cases that follow *Kendall* concern, which is
16 allegations of a secret per se conspiracy. And in these kinds
17 of cases, plaintiffs are alleging something like bid rigging
18 or market allocation or wage fixing where, you know, it's a
19 secret, illegal conspiracy. And if we had shown up and said
20 Caesars and Wynn entered into a conspiracy to fix the wages of
21 their employees and didn't provide any details about the
22 nature of that agreement, you would understandably be asking
23 the *Kendall* questions -- who, what, when, why, how -- because
24 that's a secret, illegal conspiracy.

25 But that's not what we're alleging here. We're

2:23-cv-00140-MMD-DJA - October 13, 2023

1 alleging fundamentally that this business model, at least
2 applied in these circumstances where, in a highly-concentrated
3 market, a set of competitors is using the same pricing
4 algorithm, is what's being challenged. So this is a public --

5 **THE COURT:** Go ahead.

6 **MR. PIERCE:** This is a public conspiracy. And what
7 we're basing our allegations on is largely the statements of
8 Rainmaker itself explaining how it works.

9 So it's not a situation where what's -- what's
10 happening is secret in the same way of, like, illegal per se
11 conspiracy where obviously the people who participate are not
12 going to publicize what's happening. What's being challenged
13 here is fundamentally as applied in these circumstances the
14 business model of Rainmaker. And so I think, you know,
15 defense counsel --

16 **THE COURT:** But just because the allegation here is a
17 different type of conspiracy based on this algorithm pricing
18 model doesn't mean that plaintiffs can avoid what is clear
19 in -- in *Bell Atlantic* and the case -- the Ninth Circuit cases
20 I referenced earlier, that the allegations still have to be
21 pled with some specificity for the Court to determine there's
22 a possible claim for relief.

23 **MR. PIERCE:** Yes, Your Honor. And, you know, we
24 think we have pled it in the complaint with some specificity
25 based on many of the allegations that Your Honor was going

2:23-cv-00140-MMD-DJA - October 13, 2023

1 over with defense counsel. We would be prepared to add a
2 great deal of additional specificity in an amended complaint
3 if we get to that. We have continued our factual
4 investigation since our original complaint was filed. There
5 was a fair amount of additional material just based on public
6 sources that we've been able to identify.

7 We asked for limited discovery. I would say we got
8 very limited discovery. Even the very limited discovery that
9 we got has identified -- you know, the initial disclosures for
10 certain of the defendants identified the existence of
11 agreements between them and Rainmaker. I would note we asked
12 for -- part of the limited discovery we asked for was
13 interrogatories about asking them to identify the existence of
14 agreements and identify any meetings that occurred. That
15 discovery was denied.

16 But regardless, just based on public evidence that
17 we've continued to investigate and the limited discovery we've
18 gotten so far, we think we -- in an amended complaint, if this
19 current complaint has defects, we would be able to provide a
20 great deal of additional specific information.

21 **THE COURT:** So why hasn't -- if that's the case --

22 **MR. PIERCE:** Yes.

23 **THE COURT:** -- why hasn't plaintiffs filed a motion
24 to amend?

25 **MR. PIERCE:** Just in our -- in our experience, you

UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914

2:23-cv-00140-MMD-DJA - October 13, 2023

1 don't file a motion to amend until the initial complaint is
2 dismissed. I mean, we don't think the complaint we filed is
3 defective. But if -- and often, in my experience in these
4 cases, what happens is the judge says the original complaint
5 has certain defects, and then you file an amended complaint
6 that addresses the defects. So that's sort of the procedural
7 order of operations that we have usually followed.

8 **THE COURT:** In other districts?

9 **MR. PIERCE:** In other districts. And I would say
10 just in general in all of the cases that -- as Your Honor
11 recognized, that was the basic procedure that happened in
12 cases like -- in *Kendall*, *In re DRAM*, in *Musical Instruments*.
13 There was an initial complaint. The judge dismissed it with
14 leave to amend. Plaintiffs took another shot, attempted to
15 address the defects, and then -- you know, and then the Court
16 adjudicated it again. That has been -- and in my own personal
17 practice in other districts, that has been the basic procedure
18 that has been followed.

19 **THE COURT:** So the basic procedure in other districts
20 is plaintiffs file a complaint that do not contain all the
21 specificity allegations required, wait for the defendants to
22 file a motion to dismiss, wait for the judge to tell you
23 what's deficient, and then you file an amended complaint?

24 **MR. PIERCE:** Respectfully, Your Honor, we don't think
25 the initial complaint was defective. But once we're told that

2:23-cv-00140-MMD-DJA - October 13, 2023

1 it is defective, we will file an amended complaint that
2 attempts to cure the deficiencies. That's how we have done it
3 in other -- in other districts.

4 **THE COURT:** So let's focus on the pending motions to
5 dismiss --

6 **MR. PIERCE:** Of course.

7 **THE COURT:** -- and one of the primary arguments is
8 what's lacking is -- so the complaint, the way I read it, are
9 low on a lot of details about this algorithm pricing and what
10 Rainmaker offers to their clients, including the hotel
11 operators. But what is missing to me is the dot that connects
12 the pricing recommendations as counsel -- defense counsel
13 pointed out, the pricing recommendations that Rainmaker
14 provides for their client, assuming that the client provide
15 nonpublic information about pricing, clients, and so on that
16 allows for Rainmaker's algorithms to provide pricing
17 recommendations. But they're recommendations. There's no
18 allegations in the complaint for the Court to even infer that
19 these recommendations -- that the hotel operators agree to
20 accept these recommendations and adjust their pricing; right?
21 That horizontal -- the -- is it the spoke part? That that's
22 missing in the complaint. That's the what that's missing.
23 How would you propose to cure that?

24 Well, first, do you admit that that's missing?

25 **MR. PIERCE:** Well, I think that we are going off of

2:23-cv-00140-MMD-DJA - October 13, 2023

1 Rainmaker's public statement that their recommendations are
2 accepted 90 percent of the time --

3 **THE COURT:** And you heard that -- the argument as to
4 why that doesn't mean anything, that's meaningless?

5 **MR. PIERCE:** I heard that, Your Honor. What I would
6 say is -- and I do also want to take a step back and
7 distinguish here what is concerning about the fact that these
8 pricing recommendations is being accepted is that it involves
9 a set of competitors in a specific market. If we were -- we
10 are not challenging and I don't think it would be actionable
11 if Rainmaker provides pricing recommendations to a casino that
12 doesn't have any competitors within 200 miles of it. That is,
13 you know, a single vertical agreement between Rainmaker and a
14 client where there's not the same coordinated pricing strategy
15 that is occurring among competitors.

16 Here we're talking about a set of competitors in a
17 market that we think is at least at the motion to dismiss
18 stage has been plausibly alleged, it is a different thing when
19 a set of competitors in a specific market is all accepting the
20 same pricing recommendations --

21 **THE COURT:** But that's not the allegation in the
22 complaint, though. I agree that -- so the allegation is in a
23 way very careful, right, that Rainmaker boasts 90 percent --
24 that their recommendations are accepted -- I forget the exact
25 language. Either there's a 90 percent acceptance rate or the

2:23-cv-00140-MMD-DJA - October 13, 2023

1 recommendations are accepted 90 percent of the time or
2 something to that effect.

3 **MR. PIERCE:** Yes.

4 **THE COURT:** But it doesn't speak to acceptance by the
5 hotel operators.

6 **MR. PIERCE:** Well --

7 **THE COURT:** So I can't make that connection, right,
8 to infer -- to reasonably infer that means that the hotel
9 operators in the Las Vegas Strip accept the recommendations
10 90 percent of the time. And we can argue about what the --
11 what that means, but I can't even make that inference.

12 **MR. PIERCE:** Well, Your Honor, I mean, I do think
13 reading the complaint in the light most favorable to
14 plaintiffs, I think a public statement by Rainmaker that its
15 recommendations are accepted 90 percent of the time creates a
16 plausible inference that these defendants are accepting the
17 recommendations. Also --

18 **THE COURT:** I don't think I can make that -- even if
19 I construe -- so I accept all well-pleaded allegations as
20 true, construe all reasonable inferences in plaintiffs' favor.
21 But how can I construe that in plaintiffs' favor when the
22 statement is very vague? That it does not tie to the hotel
23 operators. So you're asking me to sit -- you're arguing that
24 construing inferences in your client's favor would mean that I
25 have to say that 90 percent acceptance rate applies to the

2:23-cv-00140-MMD-DJA - October 13, 2023

1 hotel operators?

2 **MR. PIERCE:** Yes, Your Honor. And I think that --
3 that is how we would read it. And I know defense counsel
4 mentioned, you know, that Rainmaker has thousands of clients.
5 I will say, having now spent a fair amount of time reviewing
6 Rainmaker's public documents, the clients that they repeatedly
7 emphasize are a core set of 10 to 20 and -- including all of
8 the defendants. Those are the clients that they feature in
9 their public statements, in their advertisements.

10 So I know opposing counsel spoke about how there's
11 many, many clients, but the core clients that Rainmaker
12 repeatedly features, are ones that they feature interviews
13 with on their website talking about the utility of Rainmaker,
14 are in large part the defendants themselves. So when you're
15 talking about Rainmaker making these statements about pricing
16 recommendations and featuring these specific clients, I do
17 think it creates a plausible inference that pricing
18 recommendations that are given are accepted a vast majority of
19 the time. I think even if you just create a certain baseline
20 of pricing, then it is problematic. I know in Your Honor's
21 opinion in *Western Range* you talked about how deviations from
22 a price don't necessarily upset the fact that there is a
23 certain uninformative pricing -- pricing practices.

24 I think the same applies here. If you have a
25 centralized algorithm producing one pricing strategy that's

2:23-cv-00140-MMD-DJA - October 13, 2023

1 generating recommendations that are accepted a large amount of
2 the time by a set of competitors in a specific market, you
3 have significant antitrust concerns.

4 **THE COURT:** So assuming I agree with defendants that
5 the complaint is sufficient -- and I don't entirely agree with
6 defendants in all the arguments, but I certainly agree that
7 what is missing from the complaint is allegations of the
8 existence of some kind of agreement or concerted action. I
9 can't even infer that the allegations that there's parallel
10 conduct plus -- the plus factors evidences some kind of
11 proceeding agreement. That agreement part is just missing.
12 That's one deficiency. How would you propose to cure? So
13 what discovery has been conducted that would allow for you to
14 cure?

15 **MR. PIERCE:** Well, Your Honor, we've gotten initial
16 disclosures from the defendants. We've gotten work charts.
17 We do -- that will provide some information. If Your Honor
18 was inclined to reconsider the magistrate judge's order and
19 allow a certain amount of limited discovery on -- on this
20 issue, that would be helpful. But we also have continued our
21 public investigation, public -- investigation of public
22 statements. I think we've learned a great deal about how
23 Rainmaker's algorithm works, how it generates recommendations,
24 the extent to which the recommendations it generates are
25 exclusively influenced by competitor pricing, the extent to

2:23-cv-00140-MMD-DJA - October 13, 2023

1 which the recommendations are generated in a way where the
2 person who receives the recommendations either accepts them or
3 overrides them, which I think helps strengthen the inference
4 that these recommendations are the default and then are
5 overridden, if necessary, but that are otherwise accepted. So
6 I think those are all factual allegations that will help
7 support a plausible inference at the pleading stage, of
8 course, of an agreement.

9 **THE COURT:** What about the -- the argument that the
10 complaint doesn't answer the questions that *Kendall* requires?
11 Start with the who. Did you in discovery learn enough
12 information so you can answer who amongst the operator hotel
13 employees were involved in accepting the recommendations or
14 making decision to accept the recommendations?

15 **MR. PIERCE:** You know, in their initial disclosures
16 defendants identified individuals that they say possess
17 relevant knowledge, and I think those individuals are the who.
18 I think we also have gained a significant amount of
19 information throughout the relevant period based on public
20 statements of Rainmaker indicating that each of the clients
21 were participating in Rainmaker throughout the -- throughout
22 the relevant period which I think helps establish parallel
23 conduct. The other thing --

24 **THE COURT:** Speaking of relevant period, what's the
25 relevant period?

2:23-cv-00140-MMD-DJA - October 13, 2023

1 **MR. PIERCE:** Well, that's a good question.

2 **THE COURT:** Because it's kind of expansive in the
3 complaint.

4 **MR. PIERCE:** Yes. Well, we have not alleged -- you
5 know, we have not alleged fraudulent concealment. We have
6 gone off a four-year statute of limitations period. I think
7 for us the key period is, you know, between 2015 and 2017 I
8 would say Rainmaker strengthened its overall set of
9 algorithms. It added Revcaster and RevTell. In 2017 it added
10 GroupRev, which it described as sort of the final piece of the
11 puzzle. And after it sort of created this overall set of
12 revenue management algorithms, it implemented them. And so,
13 for us, the relevant period really starts in that 2015 to 2017
14 period where those algorithms all sort of come into place as
15 sort of a unified revenue management solution. And then going
16 forward, you know, we've alleged a four-year class period
17 because that's what the statute of limitations provides.

18 **THE COURT:** So the relevant period is based on the
19 algorithm pricing program that Rainmaker offers or adds to its
20 suits?

21 **MR. PIERCE:** Yes.

22 **THE COURT:** But it has nothing to do with the hotel
23 operators' conduct. Because I thought that the attempt in the
24 complaint was to show similar conduct around similar of time
25 frame. And so the similar conduct, what's the similar conduct

2:23-cv-00140-MMD-DJA - October 13, 2023

1 amongst the hotel operators then?

2 **MR. PIERCE:** Well, the similar conduct is Rainmaker
3 rolls out, you know, a set of algorithms, and then each of the
4 hotel operators --

5 **THE COURT:** What does that have to do with the hotel
6 operators?

7 **MR. PIERCE:** They use them. They use them, Your
8 Honor. That's the similar conduct, is Rainmaker sets out --
9 you know, offers the set of algorithms, and then each of the
10 individual hotel operators makes the affirmative decision to
11 use the algorithms that Rainmaker is providing.

12 **THE COURT:** So assume -- so will the allegations be
13 that, for example, as soon as Rainmaker's offer -- I think
14 2015 was the GuestRev program added?

15 **MR. PIERCE:** 2015 I believe was they added a
16 Revcaster, sort of a --

17 **THE COURT:** Revcaster, yes.

18 **MR. PIERCE:** And then 2017 I believe was GroupRev.

19 **THE COURT:** The last one, the GroupRev.

20 **MR. PIERCE:** Yes, GroupRev.

21 **THE COURT:** So is the allegation that as soon as
22 Rainmaker add the -- the GroupRev in 2017, for example, all
23 the hotel operators then subscribe to that program and utilize
24 that program and accept the pricing recommendation?

25 **MR. PIERCE:** No. At this point we are -- our amended

2:23-cv-00140-MMD-DJA - October 13, 2023

1 complaint -- I'm not going to -- you know, will be based off
2 public statements and, you know, this is -- that is not a
3 question, for example, that was answered by the discovery that
4 we got. Those were questions that would we have --

5 **THE COURT:** But you said that the hotel operators --
6 the similar conduct is the hotel operators all then utilize
7 these programs.

8 **MR. PIERCE:** Yes, Your Honor.

9 **THE COURT:** How is that different than the question I
10 just asked?

11 **MR. PIERCE:** Maybe there is no difference,
12 Your Honor --

13 **THE COURT:** And I don't mean to trick anyone. I'm
14 just trying to understand.

15 **MR. PIERCE:** Yes.

16 **THE COURT:** Because what I hear so far and I read
17 from the complaint is, as I said, there are a lot of
18 allegations about the algorithm pricing and what Rainmaker
19 claims to offer.

20 **MR. PIERCE:** Yes.

21 **THE COURT:** But you need conduct -- similar conduct
22 on the part of the hotel operators; right?

23 **MR. PIERCE:** Yes. And what we have just based on
24 public statements, even without the benefit of discovery on
25 this issue that we've found as part of our continuing

2:23-cv-00140-MMD-DJA - October 13, 2023

1 investigation, is Rainmaker in trade journals identifying, you
2 know, we offer GroupRev and GuestRev, and those programs are
3 used by -- listing a set of clients that include the
4 defendants, so -- and doing that throughout -- over a period
5 of time. And so to us that's parallel conduct. Rainmaker is
6 saying we offer these algorithms, and our clients include the
7 hotel operators.

8 **THE COURT:** But that's information you've learned so
9 far in discovery?

10 **MR. PIERCE:** That's information based on continuing
11 investigation that we've learned. Obviously, if defendants
12 would, you know, answer in interrogatory to identify, you
13 know, exactly which algorithms they were using, that would
14 further answer the question. But, you know, based just on the
15 public information, we certainly have -- we can supplement in
16 an amended complaint.

17 **THE COURT:** So the alternative theory that's offered
18 in the opposition I don't read the complaint to include, and
19 that is the theory that there's a rule -- the rule of reason
20 claim. Do you agree with that?

21 **MR. PIERCE:** Well, in *Gilley II* the Ninth Circuit
22 specifically said that a set of agreements can constitute a
23 contract, combination, or conspiracy. That's our claim, is
24 that there's a contract, combination, or conspiracy and --

25 **THE COURT:** But that's conclusory, though, in the

2:23-cv-00140-MMD-DJA - October 13, 2023

1 allegation in the complaint. I think -- I only see that
2 allegation in paragraph 88.

3 **MR. PIERCE:** Yes, Your Honor. I mean, that's where
4 we state the claim. I mean, again, if Your Honor thinks that
5 claim was not pled in the complaint, I mean, certainly in an
6 amended complaint we can, you know, break that out as a
7 separate claim and specify it. But I would just say the
8 Ninth Circuit has been clear. In *Musical Instruments* it talks
9 about how a set of agreements or multiple agreements can
10 constitute a rule of reason claim. We specifically said in
11 our claim that, you know, we're talking about either a per se
12 or a rule of reason claim. In the claim itself we talk about
13 the agreements that were entered into.

14 So certainly, if Your Honor thinks it was not
15 sufficiently broken out in the original complaint, it's a
16 claim that we can break out in more detail in the amended
17 complaint.

18 **THE COURT:** Anything more?

19 **MR. PIERCE:** You know, Your Honor, I would just say
20 that this is a novel factual pattern, but I think it is an
21 important antitrust issue. I would note that the DOJ recently
22 filed yesterday actually a -- that they were going to --
23 intended to file a statement of interest in the *RealPage* case.
24 *RealPage* involves again pricing algorithms, including pricing
25 algorithms that *RealPage* purchased from Rainmaker, and the

2:23-cv-00140-MMD-DJA - October 13, 2023

1 Department of Justice specifically discussed that the
2 algorithm pricing raises significant antitrust concerns. So
3 we do think, although this is a novel but important factual
4 area and we do -- we do -- certainly an amended complaint we
5 would provide, you know, further support for why this factual
6 pattern fits within some of the, you know, foundations of
7 antitrust law and is actionable. Thank you, Your Honor.

8 **THE COURT:** Thank you.

9 **MR. BERSHTEYN:** Your Honor, with your permission, I
10 wanted to make four quick points in response to Mr. Pierce.

11 I'll start first what Mr. Pierce said is that, with
12 the help of the discovery and other material in the public
13 record, there will be more information about how the hotel
14 defendants use or utilize the pricing recommendations. So
15 this is -- this is where we have to watch the words very
16 carefully. Because Your Honor refers to some confusion about
17 which question is being answered. That's actually a really
18 important question. The plaintiffs consistently use this word
19 "use" because it's ambiguous. So Rainmaker provides these
20 recommendations to its clients --

21 *(Phone conference interruption in proceedings.)*

22 **MR. BERSHTEYN:** I think it may just be an hour.

23 **THE COURT:** I don't think it was limited --

24 **COURTROOM ADMINISTRATOR:** I don't --

25 **THE COURT:** The AT&T line should -- that's all right.

UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914

2:23-cv-00140-MMD-DJA - October 13, 2023

1 Why don't you continue? I'm sorry, do you have -- although,
2 do you have attorneys who are listening in?

3 **COURTROOM ADMINISTRATOR:** There was a lot of people
4 on the line.

5 **THE COURT:** I had opened the line for that reason;
6 right? There were interested members of the public who were
7 listening in as well as attorneys.

8 All right. So my courtroom deputy in Reno also was
9 on the line, as well as my law clerk. That's all right. Why
10 don't we try to see if we can allow everyone to reconnect.
11 And it would have to be the same number, right, so members of
12 the public can dial in as well?

13 **COURTROOM ADMINISTRATOR:** Yes.

14 *(Pause in proceedings.)*

15 **THE COURT:** Thank you. I apologize for that.

16 **MR. BERSHTEYN:** Thank you, Your Honor.

17 So we were talking about the ambiguous word "use."
18 So that hotel -- that hotel might have access to the
19 recommendations. That doesn't do anything for plaintiffs when
20 it comes to proving an agreement. The question is: Are those
21 recommendations being adopted as the hotel's prices? And on
22 that issue we have provided direct interrogatory responses.
23 And I know -- I know we're at the pleading, so you don't have
24 to accept them as true, but I also -- I think it's important
25 because the plaintiffs raise discovery and because I want to

2:23-cv-00140-MMD-DJA - October 13, 2023

1 make sure that Your Honor doesn't think that the 90 percent
2 colloquy that we had is just some tricky math colloquy, but
3 this is -- this is actually consistent with -- with -- with
4 what the facts are, you know, at least what the discovery
5 shows.

6 So I'm reading now from Wynn's interrogatory
7 responses. Wynn Las Vegas hotels utilize their own pricing
8 algorithm to determine and set hotel room prices and have a
9 general practice of not using the recommendations generated by
10 Rainmaker's algorithms. Similar for Caesars. Caesars states
11 that it does not have a practice of using prices recommended
12 by Rainmaker Group and so on.

13 So I just want to clarify that the question that's
14 important to the Court is: Have the hotels agreed to adopt
15 these prices? To get to that, you have to first establish
16 that the hotels adopt them in the first place, and so far
17 every indication is that they don't. So that's -- that's sort
18 of my first point --

19 **THE COURT:** I thought counsel mentioned that either
20 they accept the recommendation or override. I don't know what
21 override means. Override is not adopting; I know that. I
22 think.

23 **MR. BERSHTEYN:** What I heard Mr. Pierce say is that
24 maybe they have a -- you know, there's some kind of an option
25 to -- you know, maybe Rainmaker provides a recommendation; you

2:23-cv-00140-MMD-DJA - October 13, 2023

1 can accept it or you can override it. That doesn't -- doesn't
2 get them anywhere when it comes to agreement. You have to
3 prove an agreement to actually adopt them. I mean, how would
4 an agreement to consider them and override them if you choose
5 work? That's an agreement that's impossible to monitor and
6 wouldn't get -- wouldn't get the alleged conspirators
7 anywhere.

8 I think these are all sort of examples of, you know,
9 kind of what I described as beating around the bush and trying
10 to insinuate a fact that isn't actually true but necessary for
11 this complaint to get off the ground.

12 The second point I wanted to make is a point that I
13 think might illustrate why an amended complaint here is almost
14 certainly going to be futile. So Your Honor focused
15 Mr. Pierce towards the end of his argument on this vertical
16 agreement. So I think it's -- I think it's pretty clear from
17 the argument -- and I don't think that Mr. Pierce is going to
18 dispute this -- that Rainmaker doesn't require -- in this
19 vertical agreement -- so one hotel and Rainmaker -- doesn't --
20 Rainmaker doesn't require anyone to accept their
21 recommendations 100 percent of the time or any percent of the
22 time. If Rainmaker offers a recommendation, you can take them
23 if you choose. And it is black-letter law that such a
24 vertical agreement is not a restraint, not even an agreement
25 in restraint of trade. In order to be an agreement in

2:23-cv-00140-MMD-DJA - October 13, 2023

1 restraint of trade, which is what's prohibited by Section 1 of
2 the Sherman Act, somebody in that agreement has to walk away
3 from the option of doing something. The reason price fixing
4 is a restraint of trade is that we agree we're not going to
5 lower the price. An agreement which says, you know, here's
6 the recommendations, you can take them or you can leave them,
7 is not an agreement in restraint of trade. And there is some
8 cases cited in our reply brief, including from the
9 Ninth Circuit, that hold that.

10 The only way in which it could happen, if, like,
11 Rainmaker was coercing the hotel rooms somehow to accept these
12 recommendations, which I don't think anyone's going to allege
13 in this case. So that's why this whole vertical agreement
14 line -- you know, line of thinking, which is -- I agree with
15 Your Honor, not really alleged in the complaint, is going to
16 hit a dead end.

17 Third, in the very beginning of his argument
18 Mr. Pierce said, well, the -- this sort of who, what, where,
19 when, the questions from *Kendall*, they're not really important
20 if I'm challenging a business model as opposed to some secret
21 agreement. So one doesn't have to look anywhere further than
22 *Kendall* to know that that -- that that's inaccurate. Because
23 *Kendall* was a case that was challenging the business model.
24 It was challenging the business model that Visa and MasterCard
25 had at the time, and there was -- there was no secret about

2:23-cv-00140-MMD-DJA - October 13, 2023

1 it, and yet that's exactly where that doctrine arose.

2 And then finally, fourth, I -- there is -- there is
3 another thing about the complaint that I just want to clarify
4 to make sure that there's no confusion. Because this is
5 another one of those situations where the complaint is
6 pleading something very carefully in order to insinuate
7 something else which it can't plead. This is about how
8 Rainmaker works. There is nowhere in the complaint that
9 plaintiffs allege, just as a matter of plain fact, that what
10 Rainmaker does is take sensitive information from one hotel
11 and somehow give it to another hotel or that it takes
12 sensitive information from another hotel and uses that
13 information in order to recommend prices to another hotel.
14 That's what one would think that they're alleging. That's
15 what they insinuate. But that is not the facts alleged here.

16 **THE COURT:** I'm going to let plaintiffs' counsel
17 respond to that because I thought --

18 *(Simultaneous crosstalk.)*

19 **MR. BERSHTEYN:** Reading the complaint the first
20 couple of times, I did, too. But the complaint is very
21 careful about that. Because those things are not -- I mean,
22 they can't be alleged because they're not true. What the
23 complaint alleges is two things. That the Rainmaker -- that
24 Rainmaker receives sensitive, like, occupancy information and
25 booking information from hotels. So that -- that -- that --

2:23-cv-00140-MMD-DJA - October 13, 2023

1 from it, it gives one hotel to Rainmaker, hotel gives that
2 information. Because the whole point of Rainmaker is that it
3 takes this kind of information and it analyzes it in order to
4 help that hotel improve its pricing; right? So there's
5 nothing at all remarkable about that. So that's alleged as a
6 fact.

7 And the second fact that's alleged is that Rainmaker
8 uses the pricing of the other hotels -- so if it's making --
9 if it's making a recommendation to hotel A, it is -- one of
10 the things it can use in order to inform that recommendation
11 is pricing of hotels B and C. But pricing of hotels B and C
12 is publicly available information. We can log on to Expedia
13 now and see their pricing for the next six months.

14 What plaintiffs carefully don't allege is that the
15 information from other hotels that is being used to set
16 price -- to recommend prices to hotel A is the -- is the
17 confidential information that those hotels exchange with
18 Rainmaker in order to get their analytics. And plaintiffs --
19 I hope that was clear -- and Your Honor will tell me if it's
20 not --

21 **THE COURT:** No, I understand your argument. I'm
22 going to look at my notes in a moment because I've taken some
23 notes about those allegations. But I'm going to give
24 plaintiffs' counsel a chance to respond, too.

25 **MR. BERSHTEYN:** And that's really all. I think

2:23-cv-00140-MMD-DJA - October 13, 2023

1 plaintiffs don't allege the use of confidential information in
2 order to -- for a reason, which is that --

3 **THE COURT:** So they allege -- certainly the
4 allegations that each hotel operator provide nonpublic pricing
5 information, client information, I think past pricing
6 information to Rainmaker. Rainmaker uses their pricing
7 algorithm to then recommend pricing with not just that
8 client's information but with information from all the other
9 hotels in the market.

10 **MR. BERSHTEYN:** Not the confidential information that
11 the other hotels give them. That is never alleged because
12 it's not true. What Rainmaker can access and that's
13 consistent with the reality and with plaintiffs' allegations
14 is just publicly available information about pricing. You can
15 have a program that scrapes Expedia or Priceline or frankly
16 the websites of other hotels and collect their pricing. And
17 that information could be used to inform -- it's obvious that
18 information like that could be used to inform pricing; right?
19 If you imagine yourself setting a price for a hotel without
20 Rainmaker or anything else, one thing you might want to do --
21 if you want to set it for a week from now, one thing you might
22 want to do is log into, you know, the hotel across the
23 street's website. It's like, what are they charging? Because
24 it could be that my price is totally off.

25 **THE COURT:** As a consumer, you try to do that, too.

UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914

2:23-cv-00140-MMD-DJA - October 13, 2023

1 **MR. BERSHTEYN:** Exactly. It's publicly available
2 information, and every same competitor would want to look at
3 it. Doesn't mean you have to match it, but you want to look
4 at it.

5 So what plaintiffs are doing here is kind of beating
6 around the bush to insinuate that there's exchange of
7 confidential information --

8 **THE COURT:** All right. So paragraph 8 --

9 **MR. BERSHTEYN:** Yep.

10 **THE COURT:** -- states that the defendant hotel
11 operators who collect -- they have market power in the
12 Las Vegas market -- provide real-time pricing and supply
13 information to the Rainmaker Group. This competitive data is
14 taken by the Rainmaker Group and fed through its algorithms
15 which then generate forward-looking, room-specific pricing
16 recommendations to defendant hotel operators.

17 **MR. BERSHTEYN:** Yeah. So a hotel gives it to
18 Rainmaker in order to get -- in order to get Rainmaker's
19 analytics. Rainmaker provides a bunch of analytics, including
20 these room recommendations. I mean, it's almost like -- you
21 know, imagine hiring -- imagine a hotel hires a consultant,
22 McKinsey & Company, to say, hey, can you do something to
23 improve our pricing, to make our pricing more profitable? It
24 happens all the time. Then McKinsey will say, okay, well,
25 give us all your data, give us as much data as you can, and

2:23-cv-00140-MMD-DJA - October 13, 2023

1 we'll see what we can do with it. So now you have
2 confidential information going from the client, the hotel, to
3 the consultant. Okay? There's no exchange of information
4 with any other competitor of that client, and none is alleged
5 here. But what this is, is kind of artful pleading to create
6 the impression that something nefarious is going on.

7 **THE COURT:** Give me one moment. There's some
8 additional allegations here.

9 So paragraph 57 alleges that Rainmaker Group's
10 algorithms are fueled by information provided by hotel
11 operators, including real-time access to their competitively
12 sensitive and nonpublic data on their occupancy rate and
13 guests.

14 CW 3 stated hotel operators are providing Rainmaker
15 Group with various types of internal data, including data on
16 pricing, occupancy, and customer information on individual
17 gamblers.

18 CW 1 confirmed that Rainmaker will collect
19 transaction-level data on hotel bookings and potential
20 bookings, the details of every single bookings made or
21 bookings attempted.

22 And then the next paragraph, 58, alleges that
23 Rainmaker then feeds that data into an algorithm. And then
24 paragraph 59 states that then the algorithms would then
25 recommend prices on a daily basis to hotel operators.

2:23-cv-00140-MMD-DJA - October 13, 2023

1 Why can't the Court reasonably infer from that that
2 means that the -- that Rainmaker utilizes confidential,
3 sensitive information from the hotel operators collectively
4 and then its algorithm then generates pricing recommendations
5 to each individual hotel?

6 So there is a sharing of -- I mean a collection of
7 information that's then transmitted some way through this
8 algorithm to individual hotel operators.

9 **MR. BERSHTEYN:** To the same hotel operator who
10 provided it.

11 **THE COURT:** That's not what I read -- well --

12 **MR. BERSHTEYN:** Well, Your Honor hit it right on the
13 head. That's an intentional ambiguity in order to insinuate
14 something that plaintiffs can't allege as true.

15 Look at it this way. They claim they have three
16 confidential informants from Cendyn. If it were true that
17 what Rainmaker does is actually take confidential information
18 from one hotel and use it -- use that information in order to
19 provide pricing recommendations to another hotel, that would
20 be alleged in some clear fashion. You and I wouldn't have to
21 squint at these paragraphs and say, well, I wonder what they
22 mean. Do they mean the same -- the same -- that's not how
23 complaints are supposed to be pleaded, and certainly not when
24 they claim to have confidential informants from the people who
25 run the algorithm.

2:23-cv-00140-MMD-DJA - October 13, 2023

1 **THE COURT:** All right. Thank you.

2 I'll let -- Counsel, would you address that point?
3 How would you respond to that other than in the paragraphs I
4 just pointed out?

5 **MR. PIERCE:** Thank you, Your Honor.

6 I do dispute respectfully opposing counsel's
7 insinuation that we were engaging in misleading pleading.

8 We are basing it off of, you know, the things that
9 that our CW said and Rainmaker's public statements. We don't
10 have access to how Rainmaker Group's algorithm works. But
11 what I would direct you to, for example, is paragraph 16.
12 Najam Khan, general manager of Treasure Island, stated that
13 the system's capacity to factor in competitor rates and
14 suggest optimal room rates to maximize revenue is one of its
15 best features. The opposing counsel did not dispute that the
16 defendants appear to give Rainmaker tremendous amounts of
17 their own data, and then the algorithm takes that data. And I
18 think opposing counsel also doesn't dispute that the algorithm
19 does factor in information on competitor's rates and then
20 outputs a pricing recommendation. He doesn't dispute that
21 it's the same algorithm -- same basic algorithms giving the
22 pricing recommendations to each of the defendants. So, you
23 know --

24 **THE COURT:** So -- so are plaintiffs' position that
25 the -- that Rainmaker does take information from one hotel

2:23-cv-00140-MMD-DJA - October 13, 2023

1 operator -- confidential, sensitive client information, put
2 that through its algorithm pricing program, and share that
3 with a different operator -- hotel operator?

4 **MR. PIERCE:** Your Honor, we don't have access to
5 Rainmaker's algorithm. We don't have --

6 **THE COURT:** Well, what are you alleging in the
7 complaint?

8 **MR. PIERCE:** We are alleging that the defendants give
9 Rainmaker confidential information, that the algorithm takes
10 that confidential information, that the algorithm also takes
11 information from competitors, and we don't know exactly what
12 that information from competitors is. Certainly there are
13 public acknowledgments that that information is competitor
14 rates, and that then the algorithm with the same logic outputs
15 pricing recommendations to each of the people -- each of the
16 operators who participate in Rainmaker. That's what we're
17 alleging in our complaint. And I think since -- since the
18 initial complaint, based on our continuing investigation, we
19 have more information on the extent to which sort of
20 competitor rates affect the logic of what the algorithm
21 outputs to each of the competitors. But that is, you know,
22 what we're alleging.

23 And I would also emphasize, you know, the remarks
24 from the FTC Commissioner, the guy named Bob, remarks. The
25 idea that a set of competitors has a centralized pricing

2:23-cv-00140-MMD-DJA - October 13, 2023

1 algorithm that tells them to follow a certain -- makes -- to
2 follow a certain pricing strategy collectively does not
3 depend -- it's a coordinated pricing strategy among the
4 competitors, and that's -- that's what's most important in our
5 view.

6 **THE COURT:** I'm sorry? I missed that last part. And
7 that is what?

8 **MR. PIERCE:** That's what's most important in our
9 view, the idea that the competitors are each in an agreement
10 with a centralized, you know, third party that's providing a
11 single pricing algorithm that's making recommendations to each
12 of them on the pricing strategy to pursue.

13 **THE COURT:** Why doesn't it just amount to whatever
14 information that Rainmaker's providing, if it's -- they're
15 just recommendations and plaintiff can't allege that the hotel
16 operators are required to accept those recommendations, why
17 isn't the recommendation just another piece of information
18 that a hotel operator has to make the best pricing decision?
19 It's kind of like buying data.

20 **MR. PIERCE:** Well, again, I think what distinguishes
21 it and why I went back to the example of why it's problematic
22 here, Your Honor, is that it involves a group of competitors
23 in a specific market. If it was a single competitor who hired
24 McKinsey to come in and tell it how to price better, that's
25 okay. But when a group of competitors hire the same company

2:23-cv-00140-MMD-DJA - October 13, 2023

1 to make pricing recommendations with the understanding that
2 these pricing recommendations are designed to decrease
3 discounting, are designed to stop them from pursuing occupancy
4 growth, designed to maximize revenues, it's that coordination
5 among competitors to adopt the same pricing strategy through
6 this pricing algorithm that, in our view, is problematic and
7 it's I think, you know, some of the same concerns that are
8 animating the Department of Justice's intention to file a
9 statement of interest in *RealPage*. It's that fact that
10 competitors are pursuing a coordinated pricing strategy and
11 the fact that the pricing isn't always accepted 100 percent of
12 the time, I don't think that's a defense to price fixing. I
13 mean, in many price fixing conspiracies it is not that the
14 competitors, you know, always price identically. It is that
15 you distort the workings of a competitor market; you price in
16 a coordinated fashion in a way that you would not if you were
17 truly competing with each other.

18 **THE COURT:** So I'll ask one last question.

19 Where in the complaint does it alleged that each of
20 the hotel operators in Las Vegas -- in this market that you
21 mention -- because your theory is based on the Las Vegas
22 market and the competitors using the same program. Where
23 does -- in the complaint is it alleged that each hotel
24 operator, at whatever similar time, uses the same program?

25 **MR. PIERCE:** You know, those are the statements of,

2:23-cv-00140-MMD-DJA - October 13, 2023

1 you know, the confidential witness 1, paragraph 7, and
2 confidential witness 2, talking about how they're used by --
3 how Rainmaker is used by 90 percent of the hotels on the Strip
4 or every hotel on the Strip. There's also -- we identify and
5 we discuss it in detail in our opposition brief, you know,
6 that there are public statements of Rainmaker to that effect
7 identifying which competitors are using it. And that is
8 certainly something, Your Honor, that we will be able to
9 provide additional information on in the event of an amended
10 complaint.

11 **THE COURT:** Well, one of the deficiencies is with the
12 timeline. Because I thought that there in footnote 6 -- in
13 the opposition you point out one of the allegations in the
14 complaint and then citing to I think footnote 6 in the
15 complaint where I think Rainmaker published a list of clients.
16 But the problem was with the timeline; right? Because I
17 thought that was, like, from 2012 or --

18 **MR. PIERCE:** That's from 2015, Your Honor. And I
19 think that -- that period, as I identified, in 2015 when they
20 acquire Revcaster is sort of, to us, the start of the relevant
21 period. And, you know, since then, based on our factual
22 investigation, we've gained I think more information about the
23 timeline that we'd be able to provide.

24 **THE COURT:** All right. Thank you.

25 I hope to have an order -- it may be the same order,

UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914

2:23-cv-00140-MMD-DJA - October 13, 2023

1 it may be two separate orders on the two pending motions in
2 the next couple weeks.

3 Thank you, Counsel, for the arguments.

4 *(Proceedings adjourned at 12:22 p.m.)*

5 --o0o--

6 COURT REPORTER'S CERTIFICATE

7
8 I, AMBER M. McCLANE, Official Court Reporter, United
9 States District Court, District of Nevada, Las Vegas, Nevada,
10 do hereby certify that pursuant to 28 U.S.C. § 753 the
11 foregoing is a true, complete, and correct transcript of the
12 proceedings had in connection with the above-entitled matter.

13
14 DATED: 10/16/2023

15 

16 /s/

17 AMBER McCLANE, RPR, CRR, CCR #914

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UNITED STATES DISTRICT COURT
Amber McClane, RPR, CRR, CCR #914